

# Press 'Record' To Catch Fair Housing Violators—If You Can

*Fair housing testers often go undercover to expose discriminatory housing practices, but laws prohibiting recording conversations hamper investigations*

By **Fred Freiberg** - September 6, 2022



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In Spike Lee's 2018 film, *BlacKkKlansman*, there is a scene where a white racist cop, Officer Landers, meets up with African American Officer Ron Stallworth's character and his female friend, Patrice Dumas. The bigoted Landers brags that he harassed and sexually assaulted Ms. Dumas and that he can do anything he wants to Black people without consequence.

"Get it?" he utters with a malicious smirk. Stallworth replies coolly, "I do get it," while opening his shirt to reveal that he is wired and has recorded the conversation. Landers' smile disappears as Officer Stallworth turns to fellow police officers who are sitting nearby and asks them, "Did you get it?" They reply that they did get it, and the bad cop is arrested on the spot.

The use of concealed recorders can be critical, not just in exposing racist cops, but also in documenting racially discriminatory housing practices through fair housing testing. In the past, courts have affirmed the necessity of **conducting testing** to enforce the Fair Housing Act. In 1965, Wisconsin enacted a law that prohibited housing discrimination but at the same time made it illegal to conduct testing. The law had the support of the state real estate industry, who knew that prohibiting testing would make it virtually impossible to enforce the law. By 1975, in response to a challenge by the U.S. Department of Justice in *U.S. v. Wisconsin*, a federal magistrate ruled that the anti-testing provision of the Wisconsin Open Housing Law "conflicts with the general scheme of the Fair Housing Act and therefore is invalid under the Supremacy Clause of Article VI of the United States Constitution." The court further stated that it was undisputed that **the prohibition on testing** "chills the exercise of the right to equal housing opportunity" and is "an obstacle to the accomplishment of the principal objective of Congress in passing the Fair Housing Act, that is, to provide fair housing throughout the United States.

*U.S. v. Wisconsin* recognized that testing is one of the most effective investigative tools in the enforcement of fair housing laws, but a new challenge is standing in the way. Currently, 11 states prohibit recording in-person conversations unless the consent of all parties to a conversation has been obtained. In these states, fair housing testers cannot record their

interactions with real estate agents, landlords, loan officers, and other housing providers. These so-called privacy laws are hampering fair housing enforcement and effectively shielding violators of fair housing laws from being held accountable for their discriminatory actions.

## Hearing Is Believing

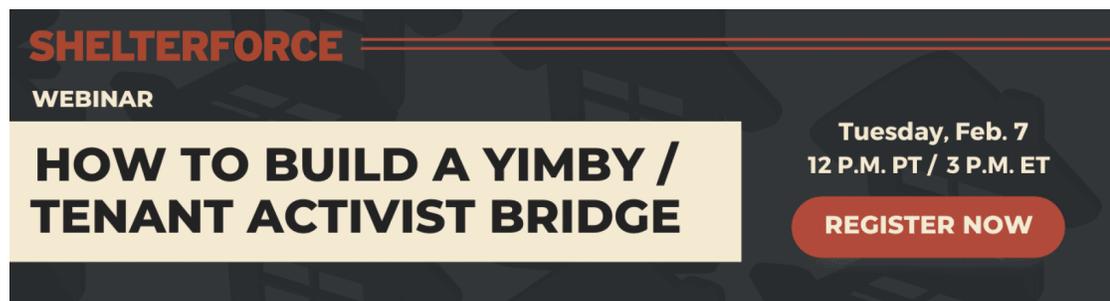
Throughout my career in fair housing, I have repeatedly observed the benefits of using recordings in both investigations and court cases. In 1979, the Metropolitan Milwaukee Fair Housing Council began equipping its testers with concealed microcassette tape recorders to document their test experiences. Since then, I have been involved in coordinating more than 12,000 tests in over 20 states and I have always utilized audio recorders in investigations that are aimed at enforcing fair housing laws. I have personally used recorders in more than 1,500 investigations where I was a tester, and quickly learned the value of recordings in providing incontrovertible evidence of illegal housing discrimination.

Over the past 46 years, I have been named as a witness in nearly 500 fair housing cases and I have provided sworn testimony in depositions and trials on roughly 70 occasions. I have witnessed firsthand how judges and juries have relied heavily on recordings to evaluate testing evidence and issued favorable decisions in fair housing cases. In 2010, I coordinated a testing investigation in the Astoria neighborhood of Queens, New York, which revealed that the on-site building superintendent falsely represented to African-American testers that no apartments were available, while showing available apartments to white testers. Four teams of African-American and white testers visited the same apartment building and all of the African-American testers received discriminatory treatment. On a couple of tests, the superintendent's wife had initial contact with some of the testers and informed African-American testers that she did not know where her husband was, but made an effort to locate her husband when white testers inquired.

The Fair Housing Justice Center (FHJC) and four African-American testers subsequently filed a federal fair housing lawsuit against the owner of the building, the superintendent, and the superintendent's wife. The defendants filed a motion for summary judgment asking the court to dismiss the case against the superintendent's wife arguing that she was not acting in any official capacity and did not work for the owner. In 2011, a federal judge carefully reviewed the test recordings to evaluate the substance and tenor of the interactions between testers of different races who visited the apartment building and met with the superintendent's spouse. The judge denied the motion to exclude the superintendent's wife from the case, characterizing her as a "gatekeeper" conveying negative and unhelpful responses to African-American testers who inquired about apartments while volunteering helpful information and assistance to the white testers. The judge concluded that "these discrepancies in treatment could lead a reasonable juror to conclude that Defendant . . . intentionally hindered and discouraged Black applicants from applying for available units." It is unlikely that without the test recordings and transcripts of these interactions between the testers and the superintendent's wife, the judge would have reached this decision. The FHJC was able to settle the case with all defendants one day prior to trial for \$341,000 along with extensive injunctive and equitable relief.

Holding people accountable for racially motivated and illegal conduct requires solid evidence. Recent successful prosecutions of the white police officer who murdered George Floyd and the white men who murdered Ahmaud Arbery provide further proof that recorded evidence can be highly probative.

I recognize that criminal cases require proof “beyond a reasonable doubt” and civil cases such as those involving fair housing only have to meet a lesser legal standard of “preponderance of the evidence” to find liability. But I have observed too many fair housing trials where judges and juries appear to struggle with the idea of holding a white defendant responsible for racially discriminatory conduct unless there is evidence that leaves virtually no doubt in their minds that illegal discrimination occurred. Recordings are often the key piece of evidence that persuades judges and juries that defendants should be held liable for their alleged discriminatory conduct.



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## Recorded Fair Housing Tests Provide Powerful Evidence of Racial Discrimination

In November 2019, the Long Island-based newspaper *Newsday* published the results of one of the largest-ever journalistic investigations into [racial discrimination in a real estate sales market](#). African-American, Latinx, and Asian American testers were matched with white testers and sent out by *Newsday* to inquire about homes for sale. Because it is legal in New York State to record phone calls and in-person contacts with only one person’s consent, all testers were equipped with concealed digital video and audio recorders. The results of this 3-year investigation were stunning. Nineteen percent of Asian/white tests, 39 percent of the Latinx/white tests, and 49 percent of the Black/white tests revealed evidence of racial steering or differential treatment based on race or national origin.

After the investigation concluded, the testers were invited by *Newsday* to listen and watch the recordings of their visits along with their counterparts. They saw with shock and dismay that their treatment in many cases was greatly disparate from that of the person with whom they were matched. What was particularly telling was that until the testers were allowed to view the audio/video recordings, only one African-American tester had even suspected she had been subjected to less favorable treatment than her white counterpart. Apart from the alarming rate of discrimination uncovered by the *Newsday* investigation, the other important finding concerned the nuanced nature of most racial discrimination in housing and the fact that it goes largely undetected by ordinary consumers.

***THE BURDEN OF ELIMINATING RACIAL DISCRIMINATION IN  
THE HOUSING MARKET SHOULD NOT FALL SOLELY ON THE***

## *VICTIMS OF DISCRIMINATION.*

Typically, most consumers are unaware when housing discrimination occurs and would have no reason to file a housing discrimination complaint. If complaints are not filed, no enforcement action is taken by government enforcement agencies. If the laws are not enforced, the cycle of discrimination simply continues. The invisibility of racial discrimination in housing virtually ensures its sustainability. Not only is testing the one investigative tool that can shine a light on continuing discrimination in the housing market, but audio recordings of tests can vividly illuminate the discriminatory conduct in more powerful ways than written narrative accounts prepared by testers.

Given the nature of contemporary housing discrimination, it is clear to me that our nation will never eliminate racial discrimination in housing if our enforcement agencies are going to rely solely on the filing of complaints. The burden of eliminating racial discrimination in the housing market should not fall solely on the victims of discrimination. We need to conduct more proactive systemic testing investigations and document these insidious practices, with recordings if possible, and hold violators accountable for their illegal conduct in courts of law.

Since 2005, the FHJC has conducted testing investigations that led to the filing of dozens of lawsuits alleging systemic discrimination based on race and/or national origin in the sale, rental, and financing of housing. The lawsuits were favorably resolved with substantial monetary recovery and extensive injunctive relief. The strength of testing evidence and the sheer ability to document and compare how home seekers of different races are treated in the housing market is a key factor that helps explain FHJC's track record. But that is not the whole story. The fact that FHJC testers are always equipped with digital audio recorders immensely contributes to FHJC's success.

Sometimes there is no substitute for being able to hear the exact words used by a housing provider when an unsolicited discriminatory statement is uttered or when misrepresentations are made about whether or when housing is available, how much the housing costs, or whether the housing can be viewed. When real estate agents, landlords, or loan officers make nuanced statements designed to steer or casual comments aimed at discouraging renters or homebuyers, sometimes their words must be heard to be believed.

### **All-Party Consent Represents a Barrier to Fair Housing Enforcement**

There are only 11 states that do not allow one-party consensual recording of in-person conversations. California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Oregon, Pennsylvania, and Washington require all-party consent to record an in-person conversation. While these 11 states constitute only 22 percent of the states, they are home to 35 percent of the U.S. population including 28 percent of the total African American population, 42 percent of the total Latinx population, and 50 percent of the total Asian population in our nation. Most of these states contain large, heavily populated metropolitan regions and many of these regions still exhibit exceedingly high levels of residential racial segregation. Currently, all-party consent laws unfairly shield housing

providers from having their commercial speech recorded even when that speech includes discriminatory misrepresentations and statements designed to discourage, steer, or deny housing opportunities to people based on race, national origin, and other protected characteristics. Do we value protecting the privacy of those in the housing industry and their commercial speech more than we care to protect entire populations who are routinely mistreated, steered, and denied housing opportunities based on their race?

Today, documenting discriminatory housing practices can be challenging because housing providers discriminate in different ways.

- Language used by discriminatory housing providers is often coded or more subtle. In some cases, the discrimination is characterized by selective misrepresentations about whether housing is available, how much it costs, steps in the application process, or when housing can be viewed. Obtaining an exact audio account of the words used by the housing provider can eliminate any ambiguity over what information housing providers gave to testers.
- Some statements made by discriminatory housing providers and reported by testers are so outrageous as to evoke disbelief or denial. Being able to listen to the exact statements made by a housing provider can convince people, including judges and juries, who may find the alleged statements to be dubious or incredible that these comments were made. Hearing is believing.
- Context matters. *How* information is conveyed can be just as important as what information is conveyed. Recordings can be tremendously helpful to judges and juries by conveying the tenor of statements made and the complexity and context of the interactions that occur between housing providers and testers posing as home seekers.

## State Laws Should Be Modified

There is ample evidence from the recent *Newsday* investigation and from the enforcement efforts of organizations like the FHJC, that racial discrimination in housing remains a persistent and pervasive fact of life in our metropolitan regions. Recordings are a critical tool in our enforcement arsenal to eliminate this scourge and ensure that all people have the right to obtain housing on a non-discriminatory basis.

All-party consent requirement laws stifle effective fair housing law enforcement and must be changed or challenged to allow fair housing testers to record their interactions with housing providers for the purpose of investigating housing market practices and enforcing fair housing laws. Simply put, being able to legally record test experiences matters because:

- Recorded evidence can be highly probative for attorneys, investigators, judges, juries, and others who must evaluate whether fair housing laws have been violated. The value of recording tests has clearly been demonstrated in litigation brought in the other 39 states by many private fair housing organizations and in all 50 states by the Civil Rights Division of the U.S. Department of Justice. This Division operates a testing program in which testers use recorders in undercover testing investigations throughout the nation regardless of state privacy laws on recording based on the Supremacy Clause of the Constitution.
- Having an exact account of conversations virtually eliminates any credibility or bias issues concerning the testers *and* at the same time protects housing providers from the possibility of facing false allegations caused by faulty memories of testers, misunderstandings, or incomplete accounts of test experiences.

For fair housing organizations, recorders provide an important quality control which helps to ensure that testers are complying with test assignments, instructions, and testing program guidelines. The use of recorders by testers can help to ensure that testing organizations maintain the highest investigative standards. To be very clear, there is nothing private about the commercial speech that housing providers use to offer housing for rent or sale or that loan officers use to talk about the terms and conditions on available home mortgage products. These conversations occur in commercial spaces frequented by the public such as rental offices, real estate offices, or lending institutions. This is language that agents should be willing to share with any consumer who contacts them for information in the public marketplace. In fact, it is precisely because too many agents still refuse to provide the same information to consumers of all races that this speech should not be kept private or protected.

Over the past several years, fair housing, civil rights, and other advocates have waged a campaign to urge California state legislators to carve out an exception to the two-party consent requirement and allow fair housing testers to record their conversations while participating in covert housing discrimination investigations. Advocates assert that this change could significantly enhance their ability to vigorously enforce fair housing laws. They are right and, well, I do get it. But the more important question is, did you get it?

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### **Fred Freiberg**

*<http://fairhousingjustice.org>*

Fred Freiberg is a co-founder and the current National Field Consultant for the Fair Housing Justice Center (FHJC) in New York City. Prior to co-founding the FHJC, he directed a fair housing testing program, which he helped to establish in 1991, in the Civil Rights Division of the U.S. Department of Justice.